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Nos. 06-1010 and 06-1011

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT COMPETITIVE GENERATORS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Federal Power Act (the "FPA" or the "Act") empowers the Federal Energy Regulatory Commission ("FERC" or the "Commission") to draw the line between its exclusive jurisdiction over the interstate transmission of electricity over the grid, and state jurisdiction over the retail market for electricity. In drawing that line here in the station power context, the Commission concluded that a generator buys no station power at retail in any month in which it was "net positive" because it supplied more power to the grid than it withdrew. Once petitioners agreed below that a generator does not purchase any station power at retail in any hour in which it was net positive, did any jurisdictional question remain for the court of appeals to decide?

2. Under FPA § 212(h), FERC may not mandate the provision of transmission services to retail customers. Does that section apply when petitioners agree that no retail sale is involved and the record shows that the provision of such services in this case is voluntary?

3. Petitioners contend that the court of appeals misunderstood the facts and misapprehended the analytical approach taken in *New York v. FERC*, 535 U.S. 1 (2002). Does the record support this contention and, even if it does, were these supposed errors of such moment that they would be "compelling reasons" under Rule 10 to grant the petition?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The Respondent Competitive Generators submitting this brief are AES Eastern Energy, L.P., AES New York, LLC, AES Somerset, L.L.C., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, Independent Power Producers of New York, Inc., KeySpan-Ravenswood, LLC., New York Power Authority, Nine Mile Point Nuclear Station, LLC, NRG Power Marketing Inc., Oswego Harbor Power LLC, PSEG Energy Resources & Trade LLC, PSEG Power New York, Inc., PSEG Power LLC, Sithe Energies, Inc., and Electric Power Supply Association, all of which were defendant-intervenors in support of FERC in the court of appeals.

KeySpan-Ravenswood, LLC has no subsidiaries and has not issued any securities to the public. Ravenswood is a direct, wholly owned subsidiary of KeySpan Corporation, a publicly held company that is traded on the New York Stock Exchange (symbol "KSE"). KeySpan Corporation entered into a merger agreement on February 25, 2006, with National Grid plc, a public limited company incorporated under the laws of England and Wales. This merger is pending, and will be consummated upon obtaining various regulatory approvals. Once the merger is consummated, KeySpan Corporation will be a wholly owned subsidiary of National Grid USA.

Nine Mile Point Nuclear Station, LLC is an indirect, wholly owned subsidiary of Constellation Energy Group, Inc., and does not issue securities to the public. Constellation Energy Group, Inc. issues securities to the public (NYSE ticker symbol "CEG").

New York Power Authority is a corporate municipal instrumentality and political subdivision of the State of New York. New York Power Authority has no parent companies,

subsidiaries, or affiliates that have any outstanding shares in the hands of the public.

AES New York, LLC ("AES NY"),
AES Eastern Energy, L.P. and
AES Somerset, L.L.C:

AES NY is an indirect, wholly owned subsidiary of The AES Corporation, a publicly held company. AES Eastern Energy, L.P., also an indirect, wholly owned subsidiary of the AES Corporation, is a limited partnership that includes AES Somerset, L.L.C., AES Cayuga, L.L.C., AES Greenidge, L.L.C., and AES Westover, L.L.C. No publicly held corporation owns 10% or more of the stock of The AES Corporation. The AES Corporation issues securities to the public (NYSE ticker symbol "AES").

Arthur Kill Power LLC ("Arthur Kill"),
Astoria Gas Turbine Power LLC ("Astoria"),
Dunkirk Power LLC ("Dunkirk"),
Huntley Power LLC ("Huntley"),
Oswego Harbor Power LLC ("Oswego") and
NRG Power Marketing Inc. ("NRG Power Marketing"):

NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego are subsidiaries of NRG Energy, Inc., a publicly held corporation. At this time, only NRG Energy, Inc. has issued shares to the public. NRG Power Marketing, Arthur Kill, Astoria, Dunkirk, Huntley, and Oswego have not issued shares to the public.

PSEG Power LLC ("PSEG Power"),
PSEG Power New York, Inc. ("PSEG Power New York") and
PSEG Energy Resources & Trade LLC ("PSEG ER&T"):

PSEG Power is a wholly owned subsidiary of Public Service Enterprise Group Incorporated ("PSEG"). PSEG Power New York and PSEG ER&T are each direct or indirect, wholly owned subsidiaries of PSEG Power.

PSEG has publicly held common stock and debt securities outstanding. Public Service Electric and Gas Company ("PSE&G"), a wholly owned subsidiary of PSEG, has publicly held preferred stock and debt securities outstanding and PSEG Power has publicly held debt securities outstanding. PSEG Energy Holdings LLC, a wholly owned subsidiary of PSEG, has publicly held debt securities outstanding. PSE&G Transition Funding, LLC, and PSE&G Transition Funding II LLC, each wholly owned subsidiaries of PSE&G, have publicly held debt securities outstanding.

In addition, publicly held securities have been issued by Delaware Statutory Trusts under the control of PSEG. They are: (i) Enterprise Capital Trusts I, II, and III; and (ii) PSEG Funding Trusts I and II, each of which is under the control of PSEG and has publicly held preferred securities outstanding.

Sithe Energies, Inc. ("Sithe") does not issue securities to the public. Sithe is a direct, wholly owned subsidiary of ExRes Power Holdings, Inc. ("ExRes"), which is an indirect, wholly owned subsidiary of Dynegy Inc. ("Dynegy"). Dynegy is publicly traded on the New York Stock Exchange (symbol DYN). ExRes is not publicly traded. On September 15, 2006, Dynegy announced a proposed combination with LS Power Group. The transaction, which has been approved by the boards of directors of Dynegy and LS Power Group, and has met all necessary regulatory approvals, is expected to close by April 2, 2007.

Electric Power Supply Association is a national trade association that has no parent corporation and issues no publicly held stock.

Independent Power Producers of New York, Inc. is a New York State not-for-profit trade association incorporated under the laws of the State of New York.

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BRIEF OF RESPONDENT COMPETITIVE GENERATORS IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The facts are stated in the court of appeals opinion (App. at 1a-13a) and in the brief for the Federal Energy Regulatory Commission. The Competitive Generators accordingly treat the facts only briefly here.[1]

[1] The Competitive Generators are independent wholesale generators of electric power in New York that compete with vertically integrated

Introduction

This case involves the treatment of "station power" in New York. (App. at 4a.) "Station power" is the electricity used at a generating facility's site to power things such as start-up, heating, lighting, and office equipment. (App. at 4a.) The court of appeals identified circumstances in which a generator might have to withdraw station power from the transmission grid:

> When a generator is operational, it might well be capable of redirecting some of its outbound generated electricity to its station power needs, thus "self-supplying" its station power "behind the meter." Certain generators, however, are physically incapable of supplying their station power behind the meter—for example, if produced power goes out to the grid on one set of power lines, and the facility's offices and electrical equipment are connected to a separate set of lines coming in from the grid. And even for those capable of self-supplying behind the meter, there may be periods when a generator is non-operational or only partially operational and thus incapable of meeting its station power demand. In such instances, generators—who at least in this case, as we understand it, are connected directly to trans-

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utilities such as the petitioners in No. 06-1010 (the "Utilities") that monopolized the electric energy market in New York prior to deregulation.

The People of the State of New York and the Public Service Commission of the State of New York (collectively the "NYPSC"), intervenors before FERC and petitioners in the court of appeals, chose to file their own petition in this Court (No. 06-1011) ("NYPSC Pet."), which the National Association of Regulatory Utility Commissioners et al. support in an amicus curiae brief. Because the arguments advanced in both petitions and in the amicus brief suffer from the same infirmities, the Competitive Generators address all of them in this consolidated brief in opposition. Except where noted, the term "petitioners" refers to the petitioners and amici in both cases, and citations to "App." refer to the appendix in the Utilities' petition in No. 06-1010.

> mission facilities—must look to the grid for their station power supply.

(App. at 4a.)

The four pairs of FERC Orders about which petitioners complain are among the latest in a long line of FERC station power cases dating back to 2000, when the deregulation of New York's electrical energy market began. (App. at 4a-6a, 106a.) Each Order involves FERC's approval of a proposal by the manager of New York's electric power transmission facilities (the New York Independent System Operator ("NYISO")) to incorporate provisions for the "monthly netting" of station power in its tariff. (App. at 6a-7a.)

As the court of appeals explained (App. at 4a-5a), monthly netting allows generators to deduct, on a monthly basis, the station power withdrawn from the grid as "negative generation" from energy supplied to the grid during that month. So, for example, a generator that took station power off the grid for five days during a month, but then supplied well in excess of that amount during the other twenty-five days in the month, would be deemed to have supplied the netted amount to the grid and to have self-supplied its station power needs for that month.

Monthly Netting in the NYISO Tariff Is Used to Account for Station Power

The NYISO proposed monthly netting to enable it to minister its transmission tariff with respect to station power. (App. at 6a-7a, 22a.) Whenever station power is withdrawn from the NYISO grid, the NYISO has to determine (1) how much, if any, station power was withdrawn from the transmission grid, (2) how much, if any, of the station power was transmitted and (3) the applicable rate for either wholesale or retail transmission of station power. (App. at 146a-51a.)

The NYISO faces practical difficulties in making these determinations. Generators' supply of electricity to the grid and station power withdrawals can and do vary over any increment of time—even within a minute[2]—and electric power commingled in the grid cannot be traced to its source.[3]

Under the NYISO tariff:

- If a generator supplies more electric power to the grid than it takes station power from the grid during the month, the generator is considered to have self-supplied all of its station power, without having to purchase it from a third party.
- If a generator has multiple generating units and one of them supplies less power to the grid than it withdraws during the month, but another of its units supplies electricity to the grid in excess of the amount withdrawn, no sale of station power occurs and the generator is considered to have self-supplied station power from another of its units. Because the station power was transmitted on the grid from one of a generator's units to another, this transmission service is subject to wholesale transmission charges under the NYISO tariff.
- If a single unit supplies more electricity to the grid than it withdraws for station power, it self-supplied its

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[2] *See KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142 at P 39 (2004) ("generation output fluctuates instantaneously" and "varies constantly") (App. at 54a) (citations and internal quotation marks omitted).

[3] *See New York v. FERC*, 535 U.S. at 7 ("electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce"); *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 461 (1972) (power supplied to a grid "is said to merge at a point and to be commingled just as molecules of water from different sources (rains, streams, etc.) would be commingled in a reservoir").

station power. No transmission service occurred and therefore no transmission charges apply.

- If a generator withdraws more station power from the grid than it supplies during the month, the generator is considered unable to self-supply and to have purchased the amount of the deficiency from a third party in a retail sale. Transmission of such purchased power over the NYISO's system is subject to the applicable rate for the retail transmission of station power under the NYISO tariff.

(App. at 5a, 148a-49a, 321a.)

FERC Jurisdiction to Approve the NYISO Tariff

The NYISO had to obtain FERC's approval of the monthly netting period for station power because Congress gave the Commission exclusive jurisdiction in FPA § 201 over the transmission of electric power in interstate commerce. *See* FPA § 201, 16 U.S.C. § 824 (App. at 248a-51a). That jurisdiction encompasses the "unbundled" transmission of power sold at retail, also referred to as "retail transmission," "local delivery service," and "local distribution service." *See New York v. FERC*, 535 U.S. at 16-17.[4]

In each of the eight Orders, the Commission explained the jurisdictional line it had drawn, why it drew it where it did, and why that line did not impermissibly encroach on state jurisdiction. The following quotations from those Orders are illustrative:

> Jurisdiction over the provision of station power depends on how it is supplied:

---

[4] Prior to the deregulation of the New York electric energy market, most electricity was sold by vertically integrated utilities that had built their own power plants, transmission lines, and local delivery systems. *Id.* at 5. Their "sales were 'bundled,' meaning that end users paid a single charge that included both the cost of the electric energy and the cost of its delivery." *Id.*

> As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of treating station power as negative generation . . . .[5]

(App. at 113a.)

The Commission must be able to determine whether facilities are transmission or local distribution facilities,

> and thus whether they are subject to our jurisdiction. Our authority to make this determination is not dependent on the ultimate outcome of the determination. . . . The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.
>
> . . . To the extent that delivery service is being provided, . . . this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities.

(App. at 115a-16a (footnote omitted).)

The NYISO's station power rules do not supersede state jurisdiction,

> "but merely apply traditional legal boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event

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[5] As the Commission noted, "integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as the new owners of the same, but now divested, generating facilities, they likewise would not be charged for station power." (App. at 230a n.24.)

> of a conflict between federal and state tariff provisions, the federal tariff provisions must control."

(App. at 55a-56a (citation omitted).)

Finally:

> A state may approve whatever retail rate level it deems appropriate . . . when a utility is, in fact, selling station power at retail or is, in fact, using local distribution facilities for the delivery of station power. When no station power service is being provided, and a merchant generator is self-supplying its station power requirements, a state cannot authorize a utility to charge and collect for station power service. Likewise, when no local distribution service to deliver station power is being provided, and a merchant generator is using only Commission-jurisdictional transmission facilities for station power deliveries, a state cannot authorize a utility to charge and collect for local distribution service.

(App. at 216a.)

FERC approved the NYISO's monthly netting of station power under the NYISO tariff. The Commission grounded its approval in part on its factual findings (not challenged here) that monthly netting most closely resembled historic and current practice under which utilities and state commissions do not treat "negative generation" as the purchase of station power at retail, and do not apply retail delivery charges to the utilities' own negative generation. (App. at 52a-53a.)

REASONS FOR DENYING THE PETITIONS

I. THE RECORD DOES NOT RAISE THE QUESTIONS PRESENTED

A. Petitioners' Agreement On The Facts Precludes Their Challenge To Monthly Netting

Before the Commission, the NYPSC and the Utilities urged FERC to adopt a "real-time" method of addressing station power, under which FERC would

> deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, *there would be no netting at all, only real-time measuring of output.*

(App. at 55a (emphasis added).) The Commission rejected this approach, because it "not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive." (App. at 55a.)

Evidently recognizing that the Commission was correct, at least about the impracticality and unprecedented nature of their real-time netting proposal, petitioners did not resurrect it in the court of appeals and do not try to revive it in this Court. Petitioners instead acknowledged on appeal that an hourly netting period in the NYISO tariff would be acceptable (App. at 9a), and beat a tactical retreat to the position that it was monthly netting that would not pass muster under the FPA. (App. at 10a.)

Thus, in their briefs and at oral argument below, petitioners agreed that no sale of station power occurs when the power a generator supplies to the NYISO-controlled grid exceeds its withdrawals from the grid over the course of an hour. (App. at 286a, 291a.) They likewise agreed that such hourly netting could properly be used under the FPA to determine the

amount of transmission service used by a generator and the applicable transmission charges under the NYISO tariff. (App. at 282a-84a, 294a.)[6]

The court of appeals held that petitioners' agreement on these facts foreclosed their argument that FERC lacked jurisdiction to approve any netting period for station power, and left only the reasonableness of the duration of the netting period (monthly versus hourly) for the court to decide. (App. at 9a-11a.)[7] To quote Senior Judge Edwards, petitioners' agreement "essentially conceded the hardest part of the case away. Because the fight then is whether [FERC is] arbitrary and capricious in using a month as opposed to an hour but most of the case is gone." (App. at 286a.)

Petitioners contend that the court of appeals misunderstood their agreement on the facts, but the record shows otherwise. Indeed, even in this Court, the Utilities acknowledge that FERC has jurisdiction to approve netting for transmission services. (Pet. at 10.) The NYPSC similarly acknowledges that it agreed to the NYISO's use of hourly netting, but argues that the court of appeals misapprehended the reason why the NYPSC did so. (NYPSC Pet. at 15-16.)

The court of appeals, however, got it exactly right: the NYPSC agreed to FERC-approved netting as a "practical accommodation" needed to perform the complex task of measuring generators' supply of power to, and withdrawals from, the NYISO-controlled grid. (App. at 9a-10a.) In light of petitioners' agreement on the facts in the court below, the

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[6] *See also* the NYPSC's reply brief in the court of appeals at 14. Under the heading, "Implementing One-Hour Netting Achieves the Necessary Result," the NYPSC argued that "the netting formula imposed in the NYISO should be supplanted with a one-hour netting period." *Id.*

[7] As the court of appeals ruled, petitioners' agreement also fatally undermines their argument that FERC Order No. 888 barred the Commission from approving monthly netting. (App. at 11a.)

case no longer presents a justiciable controversy. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (a federal court lacks the power to render a judgment on "a hypothetical state of facts"); *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (an actual controversy "must be extant at all stages of review").

B. The Same Agreement Likewise Forecloses Any FPA § 212(h) Question

According to the Utilities (but, tellingly, not the NYPSC), the NYISO netting tariff requires retail wheeling of power, which FPA § 212(h) prohibits. FPA § 212(h), 16 U.S.C. § 824k(h) (App. at 269a-70a).[8] The argument proceeds from the assumption that retail sales occur even when a generator's injections into the grid exceed its station power withdrawals over the netting period. The Utilities' agreement that no retail sales occur when such netting takes place removes the factual basis for the premise. As the Commission put it, if there is no "retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise." (App. at 62a.)

Moreover, there is nothing "mandatory" about the Utilities' transmission of station power. Just the reverse is true: participation in the NYISO is voluntary. By choosing to participate in the NYISO and agreeing to NYISO control of their transmission facilities, the Utilities voluntarily agreed to abide by the NYISO's rules for, *inter alia*, the netting of station power to determine transmission charges. The FPA

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[8] "Retail wheeling" refers to the delivery (or "wheeling") of electric energy from a supplier to a consumer over transmission and/or distribution lines. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036, at 31,771 n.516 (1996); *see also New York v. FERC*, 535 U.S. at 9 (defining "wheeling" in the wholesale context).

does not prohibit FERC from regulating such voluntary agreements. To the contrary, the Act requires FERC to do so. FPA § 205, 16 U.S.C. § 824d (App. at 252a-55a).

C. No Jurisdictional Question Remained Once Petitioners Agreed On The Facts

Petitioners insist that the court of appeals ruled that parties can confer jurisdiction by agreeing or conceding that it exists, without the court having to make an independent inquiry to satisfy itself that Congress has done so. (Pet. at 26; NYPSC Pet. at 12-13.) One searches the record in vain, however, for any basis for petitioners' remarkable proposition that the entire court of appeals simply ignored this hornbook principle, even after petitioners cited it in their petitions for rehearing *en banc*. What one does find in the opinion is the panel's unanimous conclusion that petitioners agreed at oral argument that the case did not present the predicate facts necessary to make their jurisdictional arguments. (App. at 9a-11a.) Petitioners' contention ignores the fundamental distinction between agreeing that jurisdiction exists, and agreeing that the record does or does not contain the facts on which a finding of jurisdiction (or, again in this case, a finding of no jurisdiction) depends.

The court of appeals found, and petitioners recognized, that FERC has exclusive jurisdiction over the transmission of power over the grid. (App. at 7a, 9a.) Petitioners' complaint was that FERC's approval of the monthly netting tariff unlawfully extended that jurisdiction to cover retail sales. (App. at 281a.) But petitioners agreed that some form of netting was necessary, and that there was no retail sale if a generator was net positive over an appropriate netting period. (App. at 281a-84a, 292a-94a.) Once petitioners did so, the court of appeals had no need to examine the jurisdictional underpinnings for FERC's approval of netting by the NYISO,

and no reason to determine whether FERC had improperly intruded into state jurisdiction over retail sales.

II. NO COMPELLING REASON WOULD EXIST FOR GRANTING THE PETITIONS EVEN IF THE QUESTIONS WERE PRESENTED

A. Review Would Require This Court To Re-examine The Facts

Ironically, petitioners' attack on the court of appeals' understanding of petitioners' agreement as to the facts serves only to confirm why their petitions should be denied. If the Court were to grant the petitions, the Court would have to resolve factual disputes in order to reach the questions of law the petitions urge the Court to decide. Such an exercise would not be worthy of the Court's time and attention. *See* Rule 10.[9]

B. The Merits Questions Are Insubstantial

Nor are the issues that petitioners raise otherwise of such importance as to merit review. The ultimate issue decided by the court of appeals concerned whether FERC reasonably approved a monthly, rather than an hourly, netting period. The court affirmed FERC's decision on this routine regulatory matter, concluding that FERC acted neither arbitrarily nor capriciously. (App. at 11a-13a.) Petitioners do not seek review of this aspect of the court of appeals' decision.

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[9] This is particularly true given the limited impact of the FERC Orders at issue. As the Commission noted, the station power cases only affect "a small subset of merchant generators—those that neither purchase station power nor use local distribution facilities." (App. at 60a-61a.)

C. The Court Of Appeals' And FERC's Decisions Were Correct

1. *Petitioners' Arguments Beg the Question*

Each of the arguments petitioners advance suffers from the same flaw: it assumes its own conclusion. Petitioners urge review by this Court based on the premise that FERC interfered with the jurisdiction of the states over retail sales in violation of the purported jurisdictional limits in the Federal Power Act. But nowhere do petitioners explain why station power necessarily is sold at retail, or why the states, and not FERC, should set the jurisdictional boundary of the Act in the first instance. They simply assume that station power is sold at retail, and argue from that premise that states have exclusive jurisdiction over such sales.[10] Such circular reasoning alone justifies denial of the petitions.

2. *FERC's Jurisdiction Includes the Approval of Netting*

The netting of station power serves many purposes, including those that are exclusively federal. Those federal purposes include (1) identifying the source and destination of the electricity to determine whether and, if so, how much power was transmitted on the interstate grid; and (2) assessing which, if any, NYISO tariff transmission rate applies. In this latter respect, netting also is used to determine whether a retail sale occurred, which enables the NYISO to determine the applicable transmission rate.

The use of netting for federal purposes, standing alone, provides a sufficient basis for FERC's jurisdiction to review

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[10] (*See, e.g.*, Pet. at 15 (assuming existence of retail sales and then asserting that the court of appeals' decision ousts the states of authority to regulate them); NYPSC Pet. at 15 (FERC cannot regulate the self-supply of station power "because" it falls within the state's authority over retail sales); App. at 280a.)

and approve the netting period. FERC cited its FPA jurisdiction over transmission service as the basis for its authority to approve netting. (App. at 173a-74a.) Even the Utilities expressly acknowledge FERC's authority in this regard. (Pet. at 15 n.5.) Nothing more is required to establish a basis for FERC jurisdiction.

3. *New York v. FERC Confirms FERC's Jurisdiction*

Petitioners argue that because one of the uses of netting is to define when retail sales occur, FERC approval of such netting conflicts with this Court's decision in *New York v. FERC*. Petitioners are incorrect.

The fundamental question in *New York v. FERC* and here is the same: "whether FERC exceeded its jurisdiction" when it issued the Orders in question. *New York v. FERC*, 535 U.S. at 16. The NYPSC argued in *New York v. FERC*, as it does in its petition here, that the FPA draws a "bright jurisdictional line" between FERC and the states, and does not authorize FERC to draw a different line in exercising its powers under the Act. 535 U.S. at 17.

This Court ruled instead that the FPA does not draw such a jurisdictional line and that Congress empowered FERC, not state public utilities commissions, to set the jurisdictional boundary. 535 U.S. at 17, 19-20. Petitioners here do not like the line FERC drew in determining "when, in fact, such transmission [of station power] has taken place" and would have drawn it elsewhere. (App. at 174a.) Those arguments, however, no longer are open in the wake of *New York v. FERC*. The only question that could remain would be whether FERC acted arbitrarily and capriciously in drawing the line that it did in the exercise of its undisputed jurisdiction over transmission services. Petitioners, however, do not contend in this Court that FERC did so.

Moreover, the use of netting to define when retail sales occur, and to draw a line between federal and state juris-

diction, does not conflict with state jurisdiction over retail sales. Establishing criteria to define a term, such as "retail sale," is not the same as regulating the subject matter to which the term refers. This Court relied on this very distinction in *New York v. FERC* in affirming FERC's authority to interpret the contours of federal jurisdiction established by Congress in the FPA. As the Court held, the FPA empowers FERC to exercise this authority, even when it requires the Commission to establish and apply criteria to define the words "local distribution facilities," which refer to a subject of exclusive state regulation. 535 U.S. at 22-23.[11]

FERC's authority to approve netting rests on even firmer ground. Not only does FERC use netting to define when retail sales occur, and thus establish the limits of federal jurisdiction, but FERC also employs netting for exclusively federal purposes in the implementation of its transmission jurisdiction.

4. *Netting of Station Power Accords with Historic State Regulation*

FERC's approval of netting did not intrude on states' historic regulation of retail sales for another reason as well. As noted above, New York and other states traditionally regarded station power withdrawals from the grid as negative generation, and not as local distribution or retail sales subject to retail delivery charges. The Utilities' historic practice, and

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[11] The FPA likewise empowers the Commission to decide whether "facilities are used in local distribution," which "involves a question of fact to be decided by [FERC] as an original matter." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 210 n.6 (1964). The Commission has this line-drawing definitional and fact-finding power even though "[s]ection 201(b) [of the FPA] expressly excludes [FERC] jurisdiction 'over facilities used in local distribution.'" *Id.* As the Commission emphasized in its station power cases, "the question of whether a particular merchant generator actually is using local distribution facilities" similarly is a case-specific fact for FERC to determine. (App. at 62a-63a.)

the NYPSC's long-standing approval of it, further expose the weakness of their challenge to FERC's approval of monthly netting in the NYISO tariff. In the Commission's words, "[a]llowing station power to be netted over a reasonable period of time, the [Utilities] claim . . . , is 'an astonishing situation' . . . . The [Utilities] do not explain, however, why they were comfortable with this 'astonishing situation' of netting station power when they owned the same generating facilities at issue here." (App. at 51a n.41.)

5. *The Orders Do Not Conflict with Order No. 888*

In Order No. 888, FERC found that former retail customers of utilities who previously purchased bundled sales and distribution services might try to avoid state-imposed stranded cost charges by using newly unbundled retail transmission services on the interstate grid.[12] To allow states to recover stranded costs from such former retail customers, FERC concluded that, notwithstanding its exclusive jurisdiction over all transmission of electric power in interstate commerce, including retail transmission, there nevertheless was an element of state interest in the unbundled transmission in interstate commerce of power sold to end users. Based on this legal construct or "fiction," FERC permitted states to add stranded cost charges to rates for retail transmission services, such as the rates adopted by FERC and referenced in the NYISO tariff.

In the Orders in this case, FERC held that Order No. 888's legal construct did not extend to generators' withdrawals of station power from the interstate grid, whether or not they were determined to be retail sales based on netting. The

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[12] Stranded costs are "costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become 'stranded' with the utilities." (App. at 3a.)

Commission so ruled because withdrawals of station power had never before been considered part of a bundled retail sale, and merchant generators were a new entity in the market and did not cause utilities to incur stranded costs. The withdrawal of station power from the interstate grid, therefore, did not involve the kind of deliveries to end users discussed in Order No. 888. The court of appeals rightly found FERC's reading of Order No. 888, namely that it "carve[d] out an exception from the term 'end user' for wholesale generators," to be "certainly a reasonable interpretation." (App. at 11a.)[13]

Finally, the Utilities (but, again, not the NYPSC) contend that FERC should have applied Order No. 888's seven-factor test to determine whether "paper facilities or meters" constitute local distribution facilities. (Pet. at 20.) But there was no reason for the Commission to have done so, as the delivery of station power through local distribution facilities was not at issue before the Commission (either because it was established that the plants in question connected directly to the transmission system, or because issues concerning the classification of facilities had been settled[14]).

In any event, the Utilities did not raise the issue in the court of appeals.[15] They therefore are precluded from pressing the

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[13] Contrary to the Utilities' assertion, the self-supply of station power was not at issue in *New York v. FERC*, nor is there anything in the decision that supports the Utilities' contorted interpretation of Order No. 888.

[14] *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 at PP 29, 22 (2003), *reh'g denied*, 110 FERC ¶ 61,033 (2005); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at PP 34, 36, 40, 47 (2003), *reh'g denied*, 110 FERC ¶ 61,032 at P 35 (2005); *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 at P 53 (2004), *reh'g denied*, 111 FERC ¶ 61,120 (2005); *KeySpan-Ravenswood, LLC*, 101 FERC ¶ 61,296 (2002).

[15] The Utilities' failure to do so is not surprising. In another proceeding in which the Utilities are parties, FERC rejected this very argument in an Order (not involved here) issued three days before the Utilities filed their opening brief in the court of appeals in this case. *New York*

issue here. *See, e.g., Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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Power Auth. v. Consol. Edison Co. of New York, Inc., 112 FERC ¶ 61,304 at PP 60-61 (2005), *reh'g denied*, 116 FERC ¶ 61,240 at PP 24-26 (2006), *appeal docketed, Consol. Edison Co. of New York, Inc. v. FERC*, No. 06-1360 (D.C. Cir. Oct. 26, 2006).